Supreme Court, U. S.
FILED
JUL 28 1978
MICHAEL RODAK, JR., CL

78-168

No. 78-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

THE GOODYEAR TIRE & RUBBER COMPANY, et al.,
Petitioners,

v.

FEDERAL TRADE COMMISSION, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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v.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners* respectfully request a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the District of Columbia Circuit entered in these cases on July 10, 1978.

OPINIONS BELOW

The opinion of the court of appeals (*per curiam* for a panel of Bazelon and Robinson, Circuit Judges, and Aubrey E. Robinson, Jr., District Judge)has not yet been officially reported. The opinions of the district

* The individual petitioners are Allen-Bradley Company, The Goodyear Tire & Rubber Company, Hobart Corporation, Merck & Co., Inc., Mobil Oil Corporation, Square D Company, Texaco Inc., and Van Dorn Company. A separate petition is being filed by American Air Filter Company, Inc., et al.

court are reported at 432 F. Supp. 274 (D.D.C. Jan. 21, 1977), 432 F.Supp. 291 (D.D.C. April 12, 1977) and 1977-2 Trade Cas. ¶ 61,544 (D.D.C. July 11, 1977). These opinions and the final judgments of the district court are reproduced in the separate Appendix ("App.") to this petition. Previous opinions in these cases before their transfer to, and consolidation in, the District of Columbia are reported at 396 F.Supp. 1108 (D. Del. 1975), 396 F.Supp. 1125 (D.Del. 1975), 403 F.Supp. 1000 (D.Del. 1975), 530 F.2d 515 (3d Cir. 1976), 417 F.Supp. 1068 (D.Del. 1976), 390 F.Supp. 301 (S.D.N.Y. 1975), and 67 F.R.D. 510 (S.D.N.Y. 1975).

JURISDICTION

The judgment of the court of appeals was entered on July 10, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED *

1. Whether a district court can construct special "summary" procedures outside the Federal Rules of Civil Procedure when a federal agency seeks relief in the nature of mandamus.

2. Whether under the provisions of the Federal Reports Act, that an "independent regulatory agency shall make the final determination as to the necessity" of obtaining information, and that the Comptroller General "shall determine" the "appropriateness" of a proposed agency questionnaire, the Comptroller General can approve a form if he has not determined it

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* Questions 3, 4 and 5 are also raised in a petition being filed by American Air Filter Company, Inc., et al., from the same judgment below.

will gather information that is meaningful and reliable for the agency's stated need.

3. Whether a federal agency's decision to undertake a broad-based data collection and publication program, unrelated to any enforcement or other regulatory proceeding, is subject to the rulemaking requirements of the Administrative Procedure Act, when, according to the agency, the program is designed to achieve important policy goals affecting the structure of the national economy.

4. Whether the Fourth Amendment permits judicial enforcement of agency compulsory process without balancing the relevance of the information sought against the burden imposed on a respondent.

5. Whether under Section 9(a) of the Census Act, as amended to overrule this Court's decision in *St. Regis Paper Co.* v. *United States,* 368 U.S. 208 (1961), a federal agency can compel corporations to report to it the same specially compiled information that such corporations submitted to the Census Bureau.

RULES, STATUTES AND CONSTITUTIONAL PROVISION *

Question 1 involves the following rules and statutes:

Rule 1, Fed.R.Civ.P.

Rule 3, Fed.R.Civ.P.

Rule 81(a)(3), Fed.R.Civ.P.

Rule 81(b), Fed.R.Civ.P.

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* The text of each rule, statute and constitutional provision is reproduced in Addendum A to this petition.

Section 6(b), Federal Trade Commission Act ("FTC Act") (Act of September 26, 1914, ch.311, § 6[b], 38 Stat. 717), 15 U.S.C. § 46(b).

Section 9, FTC Act, 15 U.S.C. § 49.

Question 2 involves the following statute and regulation:

Section 3512(a), (b) and (d), Federal Reports Act (Pub.L. 93-153, Title IV, § 409[b], Nov. 16, 1973, 89 Stat. 593), 44 U.S.C. § 3512(a), (b) and (d).

Section 10.7(a), Rules of the General Accounting Office, 4 C.F.R. § 10.7(a).

Question 3 involves the following statutes:

Section 551(4), Administrative Procedure Act (Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 381), 5 U.S.C. § 551(4).

Section 553, Administrative Procedure Act, 5 U.S.C. § 553.

Question 4 involves the following statute and constitutional provision:

Section 6(b), FTC Act, *supra.*

Fourth Amendment, U.S. CONST. amend. IV.

Question 5 involves the following statute:

Section 9(a), Census Act (Pub.L. 87-813, Oct. 15, 1962, 76 Stat. 922), 13 U.S.C. § 9(a).

STATEMENT OF THE CASE

Petitioners seek review of the lower court's approval of two extensive information-gathering programs of the Federal Trade Commission ("Commission"), including approval of the administrative procedures by which the programs were promulgated and the judicial procedures by which the Commission has sought to enforce its orders for the collection of the information in question. The Commission purported to invoke the district court's jurisdiction under the fourth unnumbered paragraph of Section 9 of the FTC Act, 15 U.S.C. § 49.

Facts Applicable to All Questions Presented for Review

A. Line of Business Report Program.

The Commission's Line of Business Report Program ("LB Program") is an annual statistical reporting program that seeks financial data on an accounting basis substantially different from that which companies utilize for either their internal or other reporting purposes. The "LB data" to be generated and reported by individual companies under the program are to be aggregated and published by the Commission for the announced purposes, among others, of influencing private investment decisions and of indicating to which of the nation's economic markets the Commission should allocate its antitrust law enforcement resources. The unaggregated individual company data received by the Commission, however, are not to be used in connection with any Commission law enforcement investigation or adjudication.[1]

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[1] *See* 39 Fed. Reg. 30377 (1974); 39 Fed. Reg. 30970 (1974); 40 Fed. Reg. 42243 (1975).

The LB Program is designed to collect on an annual basis line of business "financial performance data" from, initially, nearly 500 of the nation's largest and most diversified manufacturing corporations. It is to do so by means of a line of business ("LB") report form denominated "FTC Form LB".[3] That form—consisting of four "schedules"—calls for the reporting by respondent companies of revenues, costs, profits, assets and other items of financial information on the basis of some 260 "LB categories" defined by the Commission.[4] These LB categories are based on the Standard Industrial Classification ("SIC") codes developed by the Office of Management and Budget for certain statistical uses.[4]

B. Corporate Patterns Report Program.

The Commission seeks in the Corporate Patterns Report Program ("CPR Program") to collect, utilize for regulatory and law enforcement purposes and pub-

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[2] *See, e.g.*, Federal Trade Commission, Annual Line of Business Report Program, Statement of Purpose (August 1973) (LBX-9) (LB App. 308); Supporting Statement, FTC Form LB, 1974 Survey Version at 4 (July 1, 1975) (LBX-114) (LB App. 715); Instructions, Form LB, General at 1 (LBX-118) (LB App. 748). "LBX" refers to the corporate parties' master exhibits in the LB litigation in the district court (Misc. No. 76-1027), and "CPRX" refers to the corporate parties' master exhibits in the CPR litigation (Misc. No. 76-0126). "LB App." refers to the joint appendix in the LB appeal (No. 77-1728), and "CPR App." refers to the joint appendix in the CPR appeal (No. 77-1732).

[3] FTC Form LB, Line of Business Form, Annual Report under Section 6 of the Federal Trade Commission Act (LBX-117) (LB App. 735) (hereinafter "1974 Form LB").

[4] *See* Office of Management and Budget, Standard Industrial Classification Manual (1972).

lish individual company "value of shipments" data that are regularly reported to the Census Bureau on a statutorily privileged and confidential basis. These data are available to the Commission from the Census Bureau only in aggregate form.

The Commission has sent to the nation's 1,000 largest manufacturing companies a virtual carbon copy of the Item of the Census Bureau's Form MA-100 that calls for value of shipments data, utilizing precisely the same terminology, instructions and product class codes as defined by Census. And it has accompanied this form with explicit suggestions to the respondent companies that in completing the CPR form they utilize the value of shipments data contained on their retained copies of Census reports.

C. The Present Litigation.

With respect to the LB Program, petitioners seek review by this Court of the court of appeals' opinion and judgment for the Commission against more than 150 corporations on their claims challenging the legality of the LB Program, and enforcing a series of special report orders issued by the Commission under Section 6(b) of the FTC Act (15 U.S.C. § 46[b]) to implement that program. The special report orders specifically in question in this litigation require the preparation and filing with the Commission of LB reports for the 1974 reporting year.

With respect to the CPR Program, petitioners seek review by this Court of the court of appeals' opinion and judgment for the Commission against more than 200 corporations on their claims challenging the legality of the CPR Program, and enforcing a series of

special report orders issued by the Commission under Section 6(b) of the FTC Act to implement the program. These special report orders require the filing with the Commission of completed questionnaires seeking specialized statistical information that the petitioners have previously filed with the Census Bureau.

Facts Applicable to Question 1

Subsequent to commencement of pre-enforcement actions by the corporate parties to obtain judicial review of the LB and CPR Programs, the affirmance of the district court's jurisdiction by the court of appeals for the Third Circuit on an interlocutory appeal by the Commission from the District of Delaware, and the transfer of all related actions to the district court for the District of Columbia, the Commission initiated on May 12, 1976 two separate proceedings in the district court for the District of Columbia seeking the enforcement of its orders to file the CPR forms and LB forms.

To initiate the enforcement proceedings (Misc. Nos. 76-0126 and 76-0127) the Commission filed with the clerk of the district court two "Petitions" and obtained from the motions judge orders to show cause which were issued on an *ex parte* basis. The transferred cases and the Commission's new proceedings were then assigned to Judge Flannery, and on July 30, 1976 he entered a pretrial order consolidating all of these matters and establishing pretrial procedures and schedules.

As its first substantive decision, in an opinion and order entered on January 21, 1977 the district court for the District of Columbia sustained its jurisdiction over the pre-enforcement suits on the authority of

the previous Third Circuit decision but denied the corporate parties' motion to dismiss the Commission's enforcement procedings, holding, *inter alia,* that the Commission could ". . . proceed in mandamus enforcement actions by way of summary proceeding" (432 F.Supp. at 280-83).

The district court rejected the corporate parties' contention that enforcement of the Commission's orders could take place only in accordance with the procedural rights guaranteed to them by the Federal Rules of Civil Procedure. Instead, the Court implemented its unique version of summary procedures, barring all discovery and confining the presentation of evidence on factual matters. Specifically, the court allowed evidence only on one issue in the LB case and ruled that evidence would not be received from more than five corporations. A series of opinions disposing of various legal issues led to the entry on July 15, 1977 of a final judgment enforcing the Commission's orders to file the LB and CPR reports. The judgment was affirmed on appeal.

Facts Applicable to Question 2

Pursuant to his duties under the Federal Reports Act, as amended (44 U.S.C. § 3512), to review forms such as those prepared by the Commission to implement the LB Program, the Comptroller General was first confronted with FTC Form LB for the 1973 reporting year. The Comptroller General examined the problems attendant to utilizing uniform SIC-based industry categories as a basis for collecting business segment financial data, and he found that the LB Program would yield data that are "unre-

liable at best, and may be seriously misleading."[5] He nevertheless cleared the 1973 LB form, with the condition that approval of additional cycles would be "subject to significant reduction in or elimination of the problems which make the initial data unreliable."[6]

When this conditional approval was challenged by the corporate parties in the court below, the Comptroller General dramatically changed his position and disavowed any authority to evaluate questions of data reliability. For example, in his brief he expressed the belief that under Section 3512 the "agency determination of need [for information] includes the factors of meaningfulness and reliability of the reported data and, thereby, excludes it from GAO clearance review."[7]

This hesitant view of his statutory responsibilities was determinative of the Comptroller General's review of the 1974 Form LB. Thus, while acknowledging his continuing concern as to "whether any meaningful hypotheses could be tested by the data developed", he confined his findings to the facts that the requested information "is not presently available

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[5] Report to the Comptroller General of the United States on the Evaluation of the Federal Trade Commission's Proposed Annual Line of Business Report Form (Form LB) at 15 (May 10, 1974) (LB App. 400).

[6] Letter from Acting Comptroller General R. F. Keller to Commission Chairman Engman (May 13, 1974) (LBX-36) (LB App. 398).

[7] Defendant Comptroller General's Memorandum in Opposition to Plaintiffs' Motion for Partial Summary Judgment, and in Support of His Motion to Dismiss or in the Alternative, Cross-Motion for Summary Judgment at 23.

from another source within the Federal Government" and that the FTC had made some efforts "to minimize burden to respondents",[8] and he approved the form.

Facts Applicable to Question 3

The LB program was described by Lewis A. Engman, Chairman of the Commission when the program originated, as the Commission's "most important single economic activity." It is intended as a device by which American industry may be restructured and its performance "improved."

Under the program the Commission plans to obtain profit-and-loss and balance-sheet data, broken down into 260 lines of business, from hundreds of large corporations. The Commission's detailed rules of reporting are intended to ensure uniformity in each company's definition of the lines of business in which it is engaged and in the financial performance data within each line.

The kind of "segment" financial reporting on which the LB Program rests had its genesis in 1970 when the Securities and Exchange Commission amended its reporting regulations, after a rulemaking proceeding comporting with 5 U.S.C. § 553, to require limited segment financial data to be included in 10-K reports filed annually with it by corporations. The FTC initiated its own program in 1973 after it was unable to persuade the SEC to require that segment data be reported on the basis of a uniform system of line of business categories. Despite

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[8] Letter from Monte Canfield, Jr. of GAO to Commission Chairman Engman at 4-5 (Aug. 18, 1975) (LBX-130) (LB App. 798).

repeated requests since 1973, the FTC has refused to follow the example of the SEC and allow the public to participate through the rulemaking procedures prescribed in 5 U.S.C. § 553 in deciding whether the LB program would serve any useful purpose.

Uninformed by any expression of public views, the Commission made its final decision to adopt and pursue the line of business program on March 26, 1974. On the same date it said that it would hold, if requested, hearings "[w]ith the understanding that the Commission would be receptive only to improving the quality of the data received and that the basic concept of LOB reporting [would] not [be] open to question . . . ."

On August 2, 1974, after receiving from the Comptroller General a qualified and limited clearance of the 1973 Form LB under the Federal Reports Act, the Commission issued orders to approximately 350 corporations requiring them to complete the form for the 1973 reporting year of the program.[9] More than 200 corporations moved to quash these orders. These motions were denied in January 1975.

Subsequent to the initiation of litigation over the program, and to a ruling by the district court for the District of Delaware that the corporate parties were likely to prevail on their claim that the program was invalid for failure to follow prescribed rulemaking procedures, 396 F.Supp. 1108, the Commission in April 1975 invited comments on proposed technical

[9] A reporting year under the program refers to the fiscal year for which a respondent's reported data purport to reflect the results of its operations and not the year in which the data are collected.

revisions to the FTC Form LB and accompanying instructions. Again, however, it made clear that it was not interested in comments on the fundamental question of whether there should even be an LB Program.

In August 1975, after adopting with slight modifications the revisions it had proposed and after obtaining clearance of the revised report form, the Commission issued its second cycle of line of business orders (1974 Form LB) to some 450 corporations requiring them to file reports for their 1974 fiscal years. After rejecting motions to quash these 1974 orders, the Commission withdrew its then still pending 1973 orders. It has since issued additional orders for the 1975 and 1976 reporting years to an even larger number of corporations, which are outstanding.

Facts Applicable to Question 4

In their enforcement of the Commission's LB and CPR orders the courts below consistently evaded the corporate parties' arguments that, even when viewed as ordinary compulsory process, judicial review must weigh the relevance of the data to be obtained, for a stated purpose, against the burden imposed upon the respondents in generating the data. Although the corporate parties proposed to submit evidence on this issue, the courts determined as a matter of law that such a balancing was unnecessary.

Facts Applicable to Question 5

By resolution dated December 17, 1974 the Commission decided to collect information under the CPR Program and required parties to submit data on their so-called "value of shipments" by "product class". As stated in that resolution, the Commission

intended to use such data to make reports "concerning concentration, diversification and integration of firms by product classes and major groups" and to obtain

> precise information as to the position of firms and of competitive conditions in various product markets to the end that a proper determination of the effect on competition may be made in connection with the administration and enforcement of Section 5 of the Federal Trade Commission Act and Sections 2, 3 and 7 of the Clayton Act, as amended.[10]

The Commission thereafter submitted the CPR report forms to the Comptroller General for clearance under the Federal Reports Act. The Commission advised the Comptroller General at that time that "[t]he core of the data requested" was respondents' "individual company value of shipments by manufacturing product class."[11] Although such data are regularly reported to the Census Bureau, the Commission explained that it needed to collect the information independently since individual company data "are not published or otherwise available to the Federal Trade Commission staff because of confidential treatment accorded by the Bureau of the Census."[12]

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[10] Resolution Authorizing and Directing the Collection of Economic Reports (CPRX-149) (CPR App. 254).

[11] Supporting Statement for the Federal Trade Commission's Corporate Patterns Report at 6 (CPRX-10) (CPR App. 261) (hereinafter "FTC Supporting Statement").

[12] *Id.*

The Commission further advised the Comptroller General that it contemplated eventually publishing the data in a form identifiable by individual company [13] and that the CPR Program is an ongoing program pursuant to which "corporate patterns" data would be collected "every five years to coincide with the quinquennial Census of Manufactures." [14]

The Commission had at no time prior to making the submission to the Comptroller General held any hearings on the CPR Program. Nor had the Commission otherwise solicited the views or comments of the intended recipients of the CPR report forms, the public, or of the Census Bureau or other affected Government agencies.

When the Commission's plans for the CPR Program were thus disclosed, other government agencies raised strenuous objections. The Census Bureau and the Bureau of Economic Analysis (both of the Department of Commerce), asserted that the program would have a serious adverse impact on the quality of Census data. (The Bureau of Economic Analysis depends on such data for its calculation of the gross national product and other national economic accounts.) The Office of Management and Budget seconded the objections of the two agencies most immediately concerned. The Comptroller General himself finally said that, although "it is evident that the in-

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[13] FTC Supporting Statement at 8 (CPR App. 263). The Commission subsequently announced that that it would extend the time lag prior to publication for two additional years, until January 1, 1978. Authorization of Collection of Economic Reports, 40 Fed. Reg. 34026 (1975) (CPRX-37) (CPR App. 301-03).

[14] *Id.* at 4 (CPR App. 259).

formation you are seeking duplicates data already collected by the Bureau of the Census," he did not construe the Federal Reports Act as authorizing him to deny a clearance.

Thereafter, without affording any opportunity for a public expression of views, the Commission served identical orders on more than 1,000 corporations in September 1975 requiring each of them to complete and file a corporate patterns report, including the value of shipments data.

REASONS FOR GRANTING THE WRIT

I. Proper Procedure under Federal Rules of Civil Procedure for Enforcing Agency Orders

The Commission did not serve or seek to enforce a subpoena, and it never purported to invoke the third unnumbered paragraph of Section 9 of the FTC Act, which confers jurisdiction on the district court to enforce subpoenas. Rather, the Commission brought the enforcement proceedings as to both LB and CPR special report orders pursuant to the fourth unnumbered paragraph of Section 9 of the FTC Act. That paragraph provides that the district courts may order enforcement of such Commission orders by granting a writ of mandamus.

Under the express authority of the Rules Enabling Act,[15] Civil Rule 81(b) "abolished" the writ of mandamus but provides that relief previously available by mandamus may be obtained "under the practice prescribed" in the Federal Rules of Civil Procedure.

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[15] Act of June 19, 1934, ch. 651, 48 Stat. 1064. The Act, as amended, now appears at 28 U.S.C. § 2072.

Civil Rule 1 provides that the "Rules govern the procedure in the United States district courts in all suits of a civil nature . . . with the exceptions stated in Rule 81." Rule 81(b) refutes any inference that a mandamus proceeding is to be such an exception.

Notwithstanding that the Federal Rules of Civil Procedure apply by their terms to the enforcement proceedings commenced by the Commission, the district court and court of appeals below held that Rule 81(a)(3) authorized the district court to set the Rules aside in these proceedings and to construct summary procedures.

A. The Court Should Exercise Its Power of Supervision to Ensure Compliance with the Federal Rules.

The provisions of the Federal Rules of Civil Procedure governing these enforcement proceedings are clear and unambiguous. Rule 81(b) provides that relief previously available by writ of mandamus is now obtainable "under the practice prescribed in these rules".

The practice prescribed in the Rules contemplates, among other things, (a) that an action is to be commenced by the filing of a complaint, followed by the issuance and service of a summons, (b) that the discovery rights of Rules 26-36 will be available to the parties and (c) that pursuant to Rule 43 ". . . the testimony of witnesses shall be taken in open court. . . ." In the instant case the district court at the urging of the Commission consciously rejected the Rules, allowing the commencement of the proceedings by an *ex parte* order to show cause, without a complaint or summons, and severely truncating the discovery and

hearing rights which would otherwise have been available to the parties.

The district court, followed by the court of appeals, found authority to render the Rules of Civil Procedure inapplicable to these proceedings in the terms of Rule 81(a)(3). This conclusion conflicts with the plain language of Rule 81(a)(3) itself, not to mention Rule 81(b), and constitutes a repeal of the Federal Rules of Civil Procedure in proceedings to obtain mandamus relief.

Supervisory action by this Court is necessary to correct this plain misreading of the Rules. Such action is further required to protect parties from the inevitable abridgement of procedural rights attendant to summary proceedings. As the Court noted in *New Hampshire Fire Insurance Co.* v. *Scanlon,* 362 U.S. 404, 406-07 (1960) (footnotes omitted),

> Summary trial of controversies . . . is the exception in our method of administering justice. . . . The very purpose of summary rather than plenary trials is to escape some or most of these trial procedures [provided for in the Civil Rules]. Summary trials, as is pointed out in the petitioner's brief, may be conducted without formal pleadings, on short notice, without summons and complaints, generally on affidavits, and sometimes even *ex parte.* Such summary trials, it has been said, were practically unknown to the English common law and it may be added that they have had little acceptance in this country. In the absence of express statutory authorization, courts have been extremely reluctant to allow proceedings more summary than the full court trial at common law.

This Court should decide whether it wishes to follow the values expressed in the *Scanlon* opinion or, in a

marked departure, tolerate special *ad hoc* procedures in the district courts fashioned in each case in response to *ex parte* urgings of a federal agency.

B. The Court of Appeals Has Decided an Important Question of Federal Law Which Has Not Been, But Should Be, Settled by This Court.

The increasing frequency with which the Commission is resorting to a summary "mandamus" procedure under the fourth unnumbered paragraph of Section 9,[16]

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[16] Prior to the adoption of the Civil Rules, the Commission invoked on several occasions the fourth unnumbered paragraph of Section 9 to enforce special report orders. The reported cases indicate that the mandamus writ was there sought in summary proceedings. *See FTC* v. *National Biscuit Co.*, 18 F.Supp. 667 (S.D. N.Y. 1937); *FTC* v. *Baltimore Grain Co.*, 284 F. 886 (D.Md. 1922); *FTC* v. *P. Lorillard Co.*, 283 F. 999 (S.D.N.Y. 1922), *aff'd sub nom. FTC* v. *American Tobacco Co.*, 264 U.S. 298 (1924); *United States* v. *Basic Products Co.*, 260 F. 472 (W.D.Pa. 1919). Subsequent to promulgation of the Rules, however, for almost 30 years the Commission, apparently in response to the command of Rule 81(b), sought enforcement of special report orders only in plenary actions for mandatory injunctive relief. *See United States* v. *St. Regis Paper Co.*, 181 F.Supp. 862 (S.D.N.Y.), *aff'd in part & rev'd in part*, 285 F.2d 607 (2d Cir. 1960), *aff'd*, 368 U.S. 208 (1961); *United States* v. *Morton Salt Co.*, 80 F.Supp. 419 (N.D. Ill. 1948), *aff'd*, 172 F.2d 703 (7th Cir. 1949), *rev'd on other grounds*, 338 U.S. 633 (1950). It resorted to summary proceedings to obtain mandamus relief only after the district court's unexpected sanction of such procedures in 1966 through *dicta* in a subpoena case brought under Rule 81(a)(3), but examined by the court under Rule 81(b), *United States* v. *Associated Merchandising Corp.*, 256 F.Supp. 318 (S.D.N.Y. 1966). Since 1966 the Commission has abandoned its previous practice and sought enforcement of special report orders exclusively in summary proceedings. *See* (in addition to the instant cases) *FTC* v. *American Brands, Inc.*, Misc. No. 77-0098 (D.D.C. filed April 28, 1977); *FTC* v. *Exxon Corp.*, Misc. No. 76-0063 (D.D.C. March 3, 1977); *FTC* v. *Emerson Electric Co.*, Misc. No. 76-0002 (D.D.C. July 21, 1976).

the large number of agency statutes affected by Rule 81(b)[17] and the severe abridgement of rights incident to denial of the procedures secured to litigants by the Federal Rules of Civil Procedure make this question appropriate for the Court's consideration. This is especially true in view of the fact that it has not yet been ruled upon by this Court.

Although the question first arose in 1966 and has since been addressed by district courts,[18] the peculiar circumstances of the FTC enforcement actions in which it has arisen have effectively prevented appellate review of the question until this case. An important question of the propriety of the procedure followed by the Commission in enforcing its special report orders has thus continually eluded appellate review. The Commis-

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[17] The Advisory Committee Note to Rule 81(b) lists 19 statutes as "affected" by the elimination of the mandamus writ. Fed.R.Civ. P. 81(b), 28 U.S.C.A. at 28-29. Among the executive departments and regulatory agencies with mandamus statutes similar to that of Section 9 of the FTC Act, and in an identical posture with no material change of the language affected by the Civil Rules since 1938, are the Department of Agriculture (7 U.S.C. § 222); Federal Power Commission (16 U.S.C. §§ 820, 825 m[b]); Securities and Exchange Commission (15 U.S.C. §§ 77t[c], 78u[e], 79r[g]); Tariff [International Trade] Commission (19 U.S.C. § 1333[c]); Department of Defense (Secretary of the Army) (33 U.S.C. § 495); National Railroad Adjustment Board (45 U.S.C. § 153[p]); National Air Transport Adjustment Board (45 U.S.C. § 185); Federal Communications Commission (47 U.S.C. §§ 11, 401); and Interstate Commerce Commission (49 U.S.C. §§ 19a[1], 20[9]).

If the courts below are correct in their holdings on this issue, the Advisory Committee was wrong in its view that the language of its new Rule 81(b) "affected" anything at all, for the practice sanctioned in these cases was precisely the practice followed by the FTC (and other agencies) before the adoption of the Federal Rules of Civil Procedure.

[18] *See* cases cited at note 10 *supra*.

sion's repetitive practice demonstrates that, unless the question is reviewed now by the Court, the summary procedures invoked in these cases will continue to be followed by the Commission notwithstanding serious questions as to their propriety and the attendant curtailment of respondents' rights.

Further, the clear approval of such procedures in the District of Columbia Circuit by the opinion below is likely to unleash the past procedural restraint of the other agencies with similar statutory enforcement authority.

C. The Decision of the Court of Appeals Conflicts with a Decision of the United States Court of Appeals for the Third Circuit.

The court of appeals below ruled that a mandamus proceeding under the fourth unnumbered paragraph of Section 9 of the FTC Act was properly summary in nature. It did so after observing that Rule 81(b) has abolished the writ of mandamus. The court apparently concluded that a mandamus proceeding is now subsumed under the subpoena enforcement exception of Rule 81(a)(3).

The Court of Appeals for the Third Circuit held in *Richardson* v. *United States,* 465 F.2d 844, 855 (1972), *cert. denied,* 410 U.S. 955 (1973), *rev'd on other grounds,* 418 U.S. 166 (1974), that a proceeding to obtain relief in the nature of mandamus (there, under 28 U.S.C. § 1361) is in effect an action for a mandatory injunction.[19]

[19] The Court of Appeals for the Second Circuit made the same observation, in characterizing the fourth unnumbered paragraph of Section 9 of the FTC Act, in *United States* v. *St. Regis Paper*

The ruling of the court of appeals below directly conflicts with that of the Third Circuit. The question for this Court to decide is whether the relief previously obtainable by a mandamus writ is now obtainable in summary procedures, as the court of appeals below has held, or whether such relief is now obtainable in a plenary injunction action under the Federal Rules of Civil Procedure.

Moreover, the holdings of the courts below, and those of the short string of district court decisions upon which they rely,[20] conflict with all other decisions construing the effect of the Civil Rules on the procedure by which mandamus relief is to be obtained. All other courts have held that relief previously obtainable by a writ of mandamus is now obtainable in an injunction action. *See, e.g., Person* v. *St. Louis-San Francisco Ry.*, 428 F.Supp. 1148, 1150 (W.D. Okla. 1976); *MCI Communications Corp.* v. *American Telephone & Telegraph Co.*, 369 F.Supp. 1004, 1025 (E.D. Pa. 1973), *vacated on other grounds*, 496 F.2d 214 (3d Cir. 1974) (Section 406 of Communications Act of 1934, 47 U.S.C. § 406); *Rolls-Royce, Inc.* v. *Stimson*, 56 F.Supp. 22, 23 (D.D.C. 1934).

Co., 285 F.2d 607 (1960), *aff'd*, 368 U.S. 208 (1961). Moreover, prior to the ruling of the district court in *United States* v. *Associated Merchandising Corp.*, 256 F.Supp. 318 (S.D.N.Y. 1966), holding that the Civil Rules do not apply to a mandamus proceeding under this section of the FTC Act, it had been the Commission's consistent practice to pray for a mandatory injunction when seeking enforcement of special report orders and to proceed fully in accordance with the provisions of the Rules governing plenary actions. *See United States* v. *St. Regis Paper Co.*, *supra*, 285 F.2d at 610 note 5.

[20] *See* slip opinion at 42 n.117 (App. 40).

D. The Court of Appeals Has Decided This Question in a Way in Conflict with an Applicable Decision of This Court, and Thereby Ignored a Failure of District Court Subject Matter Jurisdiction.

In the course of addressing the corporate parties' contention that the Civil Rules apply to the Commission's enforcement actions, the court of appeals cavalierly rejected the corollary of that contention—*i.e.* that a deliberate failure to initiate an action as required by the Rules deprives the district court of subject matter jurisdiction. Citing language from this Court's opinion in *Schlesinger* v. *Councilman*, 420 U.S. 738, 742 n.5 (1975), the court of appeals dismissed the contention as "totally lacking in merit" (Slip opinion at 40 n.111) (App. 38). In so doing, the court of appeals misconceived the import of language from *Councilman* and sanctioned the Commission's disregard of the Civil Rules to find subject matter jurisdiction where none existed.

This Court ruled in *Councilman* that, *inter alia*, a plaintiff's failure to file a formal complaint in the face of exigent circumstances did not deprive the district court of subject matter jurisdiction and preclude entry of a valid judgment where "the court's subject-matter jurisdiction actually existed and adequately appeared to exist from the papers filed . . ." (420 U.S. at 742 n.5).

The means by which the Commission initiated these proceedings differ radically from the circumstances in *Councilman*. Here, the Commission has uniformly maintained that it did *not* commence a civil action. It, rather, intended to commence a summary enforcement proceeding by purposely filing a "petition" seeking a

show cause order, relying for jurisdiction in its petition *only* on the mandamus provision of Section 9, and it convinced the district court (and the court of appeals) that the ensuing proceedings were indeed summary, outside the Rules.

Professor Moore has noted that the failure to commence an action in accordance with Rule 3 (requiring a complaint) precludes entry of a valid judgment,[21] and numerous lower court decisions in other circuits so hold.[22] *Councilman* is not to the contrary, for it holds that under the circumstances there present the papers filed by plaintiff were deemed to be a complaint initiating a civil action.[23]

The Commission's mode of initiating and proceeding in these enforcement cases raises fundamental issues about the district court's subject matter jurisdiction and, by extension, this Court's jurisdiction. The court of appeals, in reliance upon an improper reading of *Councilman,* has refused to address these issues. This Court should review the court of appeals' ruling to clarify whether *Councilman* authorizes subject matter jurisdiction even in the face of such a calculated

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[21] 2 J. Moore, *Federal Practice* ¶ 3.04 at 3-17 (2d ed. 1977).

[22] *E.g., Farrell* v. *Ignatius,* 283 F.Supp. 58, 59-60 (S.D.N.Y. 1968); *Application of the Royal Bank of Canada,* 33 F.R.D. 296, 299-303 (S.D.N.Y. 1963); *Warren* v. *Arzt,* 18 F.R.D. 11, 12-13 (S.D.N.Y. 1955); *In re Market Basket, Inc.,* 122 F. Supp. 321, 321-22 (W.D.Mo. 1954).

[23] The corporate parties offered below to view the "petitions" filed by the Commission as complaints, if the district court would hold that the filing of a complaint was a condition for the Commission's enforcement of special report orders. 432 F.Supp. at 283 (App. 61-62). The district court expressly declined to do so. *Id.*

deviation from the Rules as here achieved by the Commission.

II. The Comptroller General's Obligation to Determine Whether Information to Be Collected Is Usable and Reliable

The court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court .

In reviewing 1974 Form LB pursuant to Section 3512 of the Federal Reports Act, the Comptroller General made no determination that the form was "appropriate" for the collection of the information which it was intended to collect. Notwithstanding his failure to ascertain the appropriateness of the form, he approved it.

The Federal Reports Act was passed by Congress to provide an effective and expert screening mechanism to filter out wasteful, meaningless and burdensome reporting programs that federal agencies might otherwise impose. Section 3512 of the Federal Reports Act [24] requires the Comptroller General to review every information-collection proposal by an independent federal regulatory agency, and to permit the program to go forward only if he finds that it meets certain criteria. The Comptroller General is directed to assure that information to be obtained by an agency is sought with a minimum burden on reporting businesses and without duplication of other agencies' collection efforts. Section 3512(d) specifically further provides that (emphasis added):

> While the Comptroller General shall determine the availability from other Federal sources of the

[24] Added by Pub.L. 93-153, Title IV, § 409(b), November 16, 1973, 87 Stat. 593.

> information sought and *the appropriateness of the forms for the collection of such information,* the independent regulatory agency shall make the final determination as to the necessity of the information in carrying out its statutory responsibilities and whether to collect such information.

The Comptroller General's duty to determine the appropriateness of an agency's proposal for the collection of information is also reflected in the regulations promulgated under the authority of Section 3512(f):

> Each review for clearance by GAO of a proposal for the collection of information *will* include consideration of whether information proposed to be collected is *presently available to the agency from another source* within the Federal Government and whether the proposed . . . report forms *impose a minimum burden* upon respondents consistent with the substantive needs of the agency and are otherwise consistent with 44 U.S.C. 3512 and *appropriate for collection of the information* sought. . . .[25]

The court of appeals below has held that, notwithstanding the language of the statute, the Comptroller General was not obligated by the Federal Reports Act to evaluate the appropriateness of the form for the collection of information sought by the Commission.

The independent regulatory agencies whose forms are subject to review under Section 3512 of the Federal Reports Act are identified as follows by the Comptroller General:[26]

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[25] 4 C.F.R. § 10.7(a) (emphasis added).

[26] 4 C.F.R. § 10.1(b).

Civil Aeronautics Board
Commodity Futures Trading Commission
Consumer Product Safety Commission
Equal Employment Opportunity Commission
Federal Communications Commission
Federal Energy Administration
Federal Maritime Commission
Federal Power Commission
Federal Trade Commission
Interstate Commerce Commission
National Labor Relations Board
Nuclear Regulatory Commission
Securities and Exchange Commission

The Comptroller General's responsibilities under this section thus have far-ranging consequences, affecting the information-gathering practices of the major regulatory agencies and, inevitably, directly affecting the public at large. A review of the Federal Register from October 1, 1977 through June 30, 1978 discloses that the Comptroller General received 142 agency requests for clearance during that period, each containing a form by definition intended to go to 10 or more respondents. One request was withdrawn by the requesting agency; the Comptroller General approved *all* other 141 requests.[27]

The Court should grant review of this question to determine whether the Comptroller General is carrying out the responsibilities of Section 3512 consist-

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[27] Without an "appropriateness" review, these clearances could include, for instance, a form from the FTC to the 1,000 largest commercial orchards requiring statistics on the numbers of their trees and groves. The Comptroller would feel compelled to approve it, in the absence of such data from another agency and provided the form was not too burdensome to complete, although it would generate indiscriminate data on all fruit trees in response to an FTC decision to examine sellers of peaches.

ently with the intent of Congress. If, as the court of appeals has ruled,[28] the "appropriateness" requirement of Section 3512(d) is merely a

> shorthand reference to the requirement of Section 3512(b) that the comptroller inspect the regulatory agency's information-gathering proposal with a view toward minimizing compliance burden,

the Comptroller General would be foreclosed from inquiring into the meaningfulness and reliability of any agency's proposed form. Without inquiry into meaningfulness and reliability, it is highly dubious that one of the key purposes of the Federal Reports Act, to gather information for "statistical compilations of *general public interest*" (44 U.S.C. § 3502 [emphasis added]), could be achieved. Notwithstanding that, under Section 3512(b), the information so gathered might not be available from other independent regulatory agencies, and notwithstanding that its collection might be accomplished with a minimum of burden, the information so collected will necessarily be totally devoid of "general public interest" if it is, as the Comptroller General found the 1973 LB form to be, unreliable and possibly misleading. Indeed, following an extensive examination of the LB Program and 1974 Form LB, the Commission on Federal Paper-

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[28] Slip opinion at 54-55 (footnotes omitted) (App. 52).

work[29] concluded in its June 10, 1977 Report on Segmented Financial Reporting at 10:[30]

> In its investigations, hearings and analysis of complaints, the Commission on Federal Paperwork has repeatedly found instances where the Congress has expressed a legitimate need for information, but the agency involved . . . has formulated programs which lacked sufficient planning or input from the public. *In the case of the LB, the resulting deficiencies in the program may undermine its intended usefulness.*

Finally, if the court of appeals was correct in holding that the promulgation and implementation of the LB Program is not subject to the Administrative Procedure Act and that summary enforcement proceedings were proper, the significance of the Comptroller General's review under Section 3512 increases dramatically. Under such circumstances his review alone would stand between potential information-gathering abuses by federal regulatory agencies and the public from whom information is sought. At a time when both the Congress and President have expressed, through, among other things, the Federal Reports Act and the Commission on Federal Paperwork, a firm intention to reduce the useless paperwork burdens imposed by the federal government, determination by this Court of the scope of the Comptroller General's review responsibilities under Section 3512 is crucially important.

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[29] The Commission on Federal Paperwork was created by Pub.L. 93-556, Dec. 27, 1974, 88 Stat. 1789. The congressional finding on which it was based is "that Federal information reporting requirements have placed an unprecedented paperwork burden upon private citizens . . . [and] business. . . ." (Section 1[a]).

[30] Emphasis added. A draft of this report appeared at LB App. 1694.

III. Failure to Comply with the Administrative Procedure Act in Adopting and Implementing LB and CPR Programs

The Chairman of the Commission described the LB Program as the Commission's "most important single economic activity." Although the CPR data are not as extensive, that program reaches over twice as many corporate respondents. Both programs are free-standing information-gathering and publication undertakings, unrelated to any specific adjudicatory or other regulatory proceeding.

As more fully discussed in the petition being filed by American Air Filter, Inc., et al., each of the programs is a rule within the Administrative Procedure Act definition (5 U.S.C. § 551 [4]). The FTC promulgated both programs without following the rulemaking requirements of the APA (5 U.S.C. § 553). The courts below have held that the Commission's powers under Section 6 of the FTC Act are not subject to the APA. It is important to resolve the question whether such an evasion is possible when an agency sets out to make policy by means of a broad-based exercise of agency process.

IV. Reviewing Court's Obligation to Balance Relevance Against Burden

In determining that the FTC's LB orders were "summarily enforceable" as ordinary compulsory process, the courts below ignored and misapplied relevant constitutional criteria established by this Court governing the enforcement of Section 6(b) orders. Review by this Court is essential because the rulings below will otherwise stand as authority for the exercise of a general warrant power by the FTC—a power which the Fourth Amendment places beyond the pale of permissible Congressional delegation.

Absent intervention by this Court, Commission process issued under Section 6(b) will be effectively immune from challenge either on the ground that it seeks irrelevant information or imposes an unreasonable burden. When this circumstance is coupled with the lower courts' additional holdings that the Commission is not required to follow APA rule-making procedures in connection with its exercise of Section 6(b) powers, that such exercise is also not subject to review under the APA's arbitrary and capricious standard, that the Comptroller General may not independently evaluate the "appropriateness" of any agency's form of inquiry, and that judicial review will be summary without normal procedures to assure a fair and full adjudication of the issues, it is evident that the net effect of the decisions below is to place Commission Section 6(b) process outside the arena of statutory and judicial control. This matter is further discussed in the petition of American Air Filter Company, Inc., et al.

V. Violation of Census Act Privilege

In *St. Regis Paper Co.* v. *United States,* 368 U.S. 208 (1961), this Court held that Section 9 of the Census Act, which guaranteed confidentiality of census submissions and their containment within the Census Bureau, did not preclude the FTC from subpoenaing a corporation's file copy of its report to Census. Congress acted in less than a year by amending Section 9 to correct what it obviously believed to be a mistakenly narrow construction of its confidentiality guarantee. In doing so it placed heavy reli-

ance[31] the dissenting opinion of Mr. Justice Black in the *St. Regis* case (368 U.S. at 229):

> Our Government should not, by picayunish haggling over the scope of its promise, permit one of its arms to do that which, by any fair construction, the Government has given its word that no arm will do. It is no less good morals and good law that the Government should turn square corners in dealing with the people than that the people should turn square corners in dealing with their Government.

Thus, Congress emphasized its intention that confidentiality of census data be respected by amending Section 9(a) to provide that "No . . . agency . . . of the Government . . . shall require, for any reason, copies of census reports . . ., [and] [c]opies of census reports which have been so retained shall be immune from legal process . . ." (13 U.S.C. § 9[a]). The courts below have held that this amendment may prohibit a demand for the actual census report document, but not for the information developed specially for and contained on it.

It is important that this Court resolve the question of what Congress intended to do in its response to an earlier decision of this Court. As stated in a letter previously submitted to this Court, the Secretary of Commerce has said that this question raises "very important issues of public policy."[32]

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[31] S. Rep. No. 2218, 87th Cong., 2d Sess. 2 (1962); H.R. Rep. No. 2437, 87th Cong., 2d Sess. 2 (1962).

[32] Letter from Juanita M. Kreps, Secretary of Commerce, to J. Randolph Wilson, authorizing him to file an enclosed affidavit of the Director of the Bureau of the Census with this Court (Nov. 2, 1977). That letter and affidavit are included in Addendum B to

CONCLUSION

For the foregoing reasons the Court should grant the petition and issue a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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this petition, along with a copy of Mr. Justice Brennan's Order continuing a stay in the CPR case previously entered by the Chief Justice. (The Commission consented to several extensions in the LB case, and a stay was also eventually entered in it *sua sponte* by the court of appeals.)

ADDENDUM A

ADDENDUM A

Rule 1, Fed.R.Civ.P.:

> These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action.

Rule 3, Fed.R.Civ.P.:

> A civil action is commenced by filing a complaint with the court.

Rule 81(a)(3), Fed.R.Civ.P.:

> . . . These rules apply to proceedings to compel the giving of testimony or production of documents in accordance with a subpoena issued by an officer or agency of the United States under any statute of the United States except as otherwise provided by statute or the rules of the district court or by order of the court in the proceedings.

Rule 81(b), Fed.R.Civ.P.:

> The writs of scire facias and mandamus are abolished. Relief heretofore available by mandamus or scire facias may be obtained by appropriate action or by appropriate motion under the practice prescribed in these rules.

Section 6(b), Federal Trade Commission Act ("FTC Act") (Act of September 26, 1914, ch.311, § 6[b], 38 Stat. 717), 15 U.S.C. § 46(b):

> The Commission shall also have power—
>
> * * *

(b) To require, by general or special orders, persons, partnerships, and corporations engaged in or whose business affects commerce, excepting banks, and common carriers subject to the Act to regulate commerce, or any class of them, or any of them, respectively, to file with the Commission in such form as the Commission may prescribe annual or special, or both annual and special, reports or answers in writing to specific questions, furnishing to the Commission such information as it may require as to the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals of the respective persons, partnerships, and corporations filing such reports or answers in writing. Such reports and answers shall be made under oath, or otherwise, as the Commission may prescribe, and shall be filed with the Commission within such reasonable period as the Commission may prescribe, unless additional time be granted in any case by the Commission.

Section 9, FTC Act, 15 U.S.C. § 49:

For the purposes of sections 41 to 46 and 47 to 58 of this title, the Commission, or its duly authorized agent or agents, shall at all reasonable times have access to for the purpose of examination, and the right to copy any documentary evidence of any person, partnership, or corporation being investigated or proceeded against; and the Commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. Any member of the Commission may sign subpoenas, and members and examiners of the Commission may administer oaths and affirmations, examine witnesses, and receive evidence.

Such attendance of witnesses, and the production of such documentary evidence, may be re-

quired from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpoena of the Commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.

Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any person, partnership, or corporation, issue an order requiring such person, partnership, or corporation, to appear before the Commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

Upon the application of the Attorney General of the United States, at the request of the Commission, the district courts of the United States shall have jurisdiction to issue writs of mandamus commanding any person, partnership, or corporation to comply with the provisions of sections 41 to 46 and 47 to 58 of this title or any order of the Commission made in pursuance thereof.

* * *

Section 3512(a), (b) and (d), Federal Reports Act (Pub.L. 93-153, Title IV, § 409[b], Nov. 16, 1973, 89 Stat. 593), 44 U.S.C. § 3512(a), (b) and (d):

(a) The Comptroller General of the United States shall review the collection of information required by independent Federal regulatory agencies described in section 3502 of this chapter to assure that information required by such agencies is obtained with a minimum burden upon business enterprises, especially small business enterprises, and other persons required to furnish the infor-

mation. Unnecessary duplication of efforts in obtaining information already filed with other Federal agencies or departments through the use of reports, questionnaires, and other methods shall be eliminated as rapidly as practicable. Information collected and tabulated by an independent regulatory agency shall, as far as is expedient, be tabulated in a manner to maximize the usefulness of the information to other Federal agencies and the public.

(b) In carrying out the policy of this section, the Comptroller General shall review all existing information gathering practices of independent regulatory agencies as well as requests for additional information with a view toward—

(1) avoiding duplication of effort by independent regulatory agencies, and

(2) minimizing the compliance burden on business enterprises and other persons.

* * *

(d) While the Comptroller General shall determine the availability from other Federal sources of the information sought and the appropriateness of the forms for the collection of such information, the independent regulatory agency shall make the final determination as to the necessity of the information in carrying out its statutory responsibilities and whether to collect such information. If no advice is received from the Comptroller General within forty-five days, the independent regulatory agency may immediately proceed to obtain such information.

Section 10.7(a), Rules of the General Accounting Office, 4 C.F.R. § 10.7(a):

(a) Each review for clearance by GAO of a proposal for the collection of information will include consideration of whether information pro-

posed to be collected is presently available to the agency from another source within the Federal Government and whether the proposed plans or report forms impose a minimum burden upon respondents consistent with the substantive needs of the agency and are otherwise consistent with 44 U.S.C. 3513 and appropriate for collection of the information sought. The agency shall finally determine its substantive need for information. However, GAO will consider an agency's need for information, as well as any other issues insofar as relevant to the criteria specified in this subsection.

Section 551(4), Administrative Procedure Act (Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 381), 5 U.S.C. § 551 (4):

For the purpose of this subchapter—

* * *

(4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing; . . .

Section 553, Administrative Procedure Act, 5 U.S.C. § 553:

* * *

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

ADDENDUM B

ADDENDUM B

THE SECRETARY OF COMMERCE

WASHINGTON, D.C. 20230

November 2, 1977

Dear Mr. Wilson:

Re: FTC Corporate Patterns Report Litigation

The Department of Commerce has taken the position —and I personally believe—that Corporate Patterns Report litigation raises very important issues of public policy. As indicated in the affidavit furnished last year by former Census Director, Vincent Barabba, the litigation also has potential impact on the Census Bureau, an agency of the Department of Commerce, and various governmental users of the Census Bureau's statistical data, including the Department's Bureau of Economic Analysis.

The Department is concerned about denial of a stay while this case is on appeal. Enforcement pending appeal, would in practical effect, render academic much of the controversy now before the Court of Appeals. Likewise, the adverse consequences about which the Census Bureau has expressed such strong concern would result as much from a requirement that reports be filed pending appeal as they would from an appellate decision on the merits to the same effect. The Department of Commerce therefore strongly favors continuation of a stay until these important issues are resolved by the Court of Appeals on their merits.

Accordingly, we are furnishing you the enclosed affidavit of the Director of the Bureau of the Census which you are authorized to file with the Supreme Court.

Sincerely,

/s/ JUANITA M. KREPS
Juanita M. Kreps

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

IN RE FTC CORPORATE PATTERNS REPORT LITIGATION

No. A-370

Affidavit

County of Prince George's)
State of Maryland) ss

I, MANUEL D. PLOTKIN, being duly sworn, hereby depose and say as follows:

1. I am the Director of the Bureau of the Census, Department of Commerce. I have been the Director since I was confirmed by the Senate on May 13, 1977. I make this affidavit based upon personal knowledge and on information available to me in my official capacity.

2. The purpose of this affidavit is to present information as Director of the Bureau of the Census with respect to consideration by this Court of the stay of the District Court's July 15, 1977 enforcement order pending review by the Court of Appeals. The Bureau of the Census strongly favors continuation of the Court's stay of the District Court's order because of the adverse effect that denial of a stay could have on the integrity, completeness, and timeliness of national statistical programs, both voluntary and mandatory.

3. Even in mandatory programs, the accuracy and completeness of census data are dependent upon the

goodwill and cooperation of respondents. The Census Bureau has developed a high degree of such cooperation because respondents are confident that information supplied the Census Bureau will be handled on a confidential basis and will be used solely for statistical purposes.

4. An example of a mandatory program that could be adversely affected by denial of a stay in this case is the Bureau of Census' five-year economic benchmark census. The Bureau is in the final stages of preparation of its major 5-year economic benchmark census. Within the next 60 days, report forms will be mailed to more than 2½ million establishments, including all establishments of the plaintiff companies, requesting information for the year 1977. Since the economic censuses use the "establishment" as a reporting entity, many of the requested data items are not readily available in the accounting records of multiestablishment companies. These data items involve unique statistical concepts, and I know of no accepted accounting standards which would require companies to maintain such records. Accordingly, respondents must make estimates of reported information, such as the value of interplant transfers at full economic value.

5. If a stay were denied and companies were requested to file such data with the FTC, many firms might decline to submit information based on estimates (as they have in the past) for fear that such data would be used for other than statistical purposes. Rather, firms might restrict their reporting to data that can be substantiated from book records, an alternative that is legally permissible. The result would

be the submission of less reliable and useful statistical data to the Census Bureau.

6. The impact could be even greater with respect to voluntary programs. The Bureau of the Census is dependent on the voluntary cooperation of American industry in the conduct of numerous surveys that provide important economic indicators. These surveys include the monthly Manufacturers' Shipments, Inventories, and Orders Survey, the weekly and monthly Retail Sales Surveys and numerous monthly and quarterly Current Industrial Reports. Enforcement of the District Court's order pending appeal could reduce the willingness of firms to cooperate with many of the Bureau of the Census' important statistical programs in which information is reported on a voluntary basis.

7. Denial of a stay would have the impact described above on the Census Bureau and various of its statistical programs. It would also affect users of Census data within the government. For example, it could affect the updating of numerous Federal statistical series, such as the Gross National Product accounts prepared by the Bureau of Economic Analysis, another agency of the Department of Commerce, the Wholesale Price Index, prepared by the Bureau of Labor Statistics, and the Index of Industrial Production prepared by the Federal Reserve Board. In addition, the Census of Manufactures data are widely used by other government agencies such as the Council of Economic Advisers, the Departments of Energy and Treasury in analytical studies of specific industries, products, materials, or fuels consumed.

8. In short, my major concern is that denial of the stay at this crucial time would irreparably harm both the 1977 Economic Censuses and important voluntary economic surveys. This concern is similar to that expressed by former Census Director, Vincent P. Barabba, in an affidavit filed in District Court.* For these reasons, the Bureau of the Census strongly favors the issuance of a stay pending a decision on the merits by the Court of Appeals.

/s/ MANUEL D. PLOTKIN
Manuel D. Plotkin

(Subscription Omitted in Printing)

* See Exhibit A to Applicants' Application for a Stay of An Order of the District Court for the District of Columbia.

SUPREME COURT OF THE UNITED STATES

Nos. A-370 and A-389

AIR PRODUCTS & CHEMICALS, INC., ET AL., *Petitioners,*

v.

FEDERAL TRADE COMMISSION

and

ATLANTIC RICHFIELD CO., ET AL., *Petitioners,*

v.

FEDERAL TRADE COMMISSION
(IN RE FTC CORPORATE PATTERNS
REPORT LITIGATION)

Order

IT IS ORDERED that the application for stay of the order of the United States District Court for the District of Columbia entered July 15, 1977, presented by counsel for the Atlantic Richfield Company and Fairmont Foods Company be, and the same is hereby, granted pending final disposition of the appeal in the United States Court of Appeals for the District of Columbia Circuit.

IT IS FURTHER ordered that upon consideration of the application of counsel for the applicants in A-370 and the response filed thereto, that the stay heretofore entered by the Chief Justice on October 26, 1977, be, and the same is hereby, continued pending final disposition of the appeal in the United States

Court of Appeals for the District of Columbia Circuit.

/s/ WILLIAM J. BRENNAN, JR.
Associate Justice of the Supreme Court of the United States

Dated this 7th day of November, 1977

Supreme Court, U.S.
FILED
OCT 30 1978
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

No. 78-168

October Term, 1978

THE GOODYEAR TIRE & RUBBER COMPANY, *et al.*,
Petitioners,

v.

FEDERAL TRADE COMMISSION, *et al.*,
Respondents.

REPLY BRIEF OF PETITIONERS

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No. 78-168

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Respondents.

REPLY BRIEF OF PETITIONERS

This reply brief is being filed to address several arguments raised by respondents with respect to the Federal Reports Act and the FTC enforcement proceeding questions.[1]

Although respondents' brief ignores the fact, it should initially be noted that since the petition was filed the Court of Appeals has rendered a decision denying the Commission's motion for issuance of the mandate, stating:

> We have examined the petitions for certiorari and find that the issues they tender are substantial.

[1] These petitioners will rely upon the separate Reply being filed by American Air Filter Company, Inc. in No. 78-167 as to the other questions presented by both petitions.

I. The Federal Reports Act.

Respondents do not contend that the Federal Reports Act question presented by petitioners is unimportant or otherwise unworthy for certiorari. Rather, they simply endorse the Court of Appeals' decision.

Petitioners agree that the Federal Reports Act ". . . does not require the Comptroller General to duplicate all of the functions initially performed by the FTC" (Brief in Opp. at 19). Section 3512(d) of the statute clearly contemplates that an agency can determine its need for information "and whether to collect such information". The Act should, however, be construed to provide for an independent evaluation by the Comptroller General, using the expertise of the General Accounting Office, of whether the agency's proposed form will generate the information sought. This is merely an objective, unbiased judgment that should be unaffected by the Comptroller General's attitude concerning the wisdom of the agency's intended use of the information. If the agency desires to count apples, the Comptroller General should insist that it eliminate or change those questions that call for oranges. Unfortunately, he has exhibited uncertainty as to his authority.

It is clear that the Comptroller General and the Commission now disagree as to his statutory function. Respondents' brief acknowledges as much (n. 23 at 21). The problem, however, is not confined to the Commission, and similar questions arise almost daily with respect to the forms of over a dozen independent regulatory agencies that are directed to thousands of persons. This case squarely presents a question of continuing importance: what is the proper role of the Comptroller General under the Federal Reports Act?

II. Summary District Court Enforcement.

Respondents assert that the absence of a conflict among the circuits on whether the Commission may obtain enforcement of a special report order in a summary proceeding makes this Court's review inappropriate (Brief in Opp. at 17). But the Commission selects the forum in which its enforcement proceedings are brought[2] and has consistently brought all such proceedings in the District Court for the District of Columbia. Accordingly, although the propriety of its procedure is open to serious debate, a conflict among the circuits on this specific question will never emerge. Even without an inter-circuit conflict, however, the issue is an important one of federal procedure. Moreover, there is an existing conflict on the underlying premise of the nature of mandamus relief (Petition at 21-22).

The Rule 81(b) issue has far-ranging significance. Respondents contend that this issue arises only in the "relatively few instances" where the Commission seeks enforcement of a special report order under Section 49 alone rather than in conjunction with a proceeding under Section 50 for civil penalties (Brief in Opp. at 17). That point is misleading because the Commission, since the *Associated Merchandising* decision[3] in 1966, has followed an exclusive practice of seeking enforcement of special report orders under Section 49 alone.[4] Thus, the Rule 81(b) issue is of continuing practical importance. Furthermore, numerous other federal agencies have comparable mandamus provisions in their statutes,[5] and this issue applies equally to their enforcement efforts.

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[2] In this case for example, while pre-enforcement actions were pending in two other districts, the Commission still chose to institute summary proceedings in the District of Columbia.

[3] 256 F. Supp. 318 (S.D.N.Y. 1966).

[4] See Petition at 19 n.16.

[5] *See, e.g.*, Petition at 20 n.17.

Respondents further urge that review is inappropriate because the differences in procedure between a plenary action and the instant cases are "inconsequential" (Brief in Opp. at 17). Respondents are mistaken. Not only do the Civil Rules, and the cases applying the Rules, distinguish clearly between plenary civil actions, to which the Rules apply fully, and proceedings to enforce subpoenas, to which the Rules have only limited application, but the Commission has steadfastly maintained throughout this litigation that the availability of summary proceedings is of the utmost importance. Why else, for example, would it refuse to permit the characterization of the petitions by which it initiated the enforcement proceedings as complaints under Rule 3?[6]

Respondents contend that, in any event, review is inappropriate because the petitioners have not been prejudiced by the summary proceedings in the instant cases (Brief in Opp. at 17). The short answer is that petitioners were denied, among other things, the discovery rights which would otherwise have been available in a plenary proceeding under the Rules. But more fundamentally, the Commission's failure to commence a civil action calls into question the subject matter jurisdiction of the district court, a matter of importance entirely without regard to the presence or absence of prejudice to the parties.

Finally respondents urge that review is inappropriate because "the question presented may become academic" by the passage of legislation dealing with the issue. This contention is particularly ironic since the legislation (H. R. 3816) before the 95th Congress that may have affected the enforcement of special report orders was *defeated* on the House's consideration of a second conference report.

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[6] See 432 F. Supp. at 283 (D.D.C. 1977).

See 124 Cong. Rec. H11017-H11032 (daily ed. Sept. 28, 1978). The issue now before the Court is obviously quite alive.

CONCLUSION

For the foregoing reasons and those set forth in the petition, the Court should grant the petition and issue a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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